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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 533

SOKOL BROTHERS FURNITURE COMPANY,
Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF AND ARGUMENT IN SUPPORT THEREOF.

CRAMPTON HARRIS,
Attorney for Petitioner.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Sokol Brothers Furniture Company, respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in this case.

Opinions Below

The opinion of the Tax Court (R. 87-96) is reported in C. C. H., Dec. 16,878 (M). The opinion of the United States Court of Appeals for the Fifth Circuit (R. 108-114) is reported in 185 F. (2d) 222.

Jurisdiction

The judgment of the Court of Appeals was entered on November 22, 1950 (R. 114) and a timely petition for rehearing was denied on December 27, 1950 (R. 121). The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

Question Presented

The Petitioner, for the taxable years 1944 and 1945 reported its income for income and surtax purposes on the installment basis of accounting under the provisions of Section 44 (a) of the Internal Revenue Code. At the same time it reported its income for excess profits tax purposes on the accrual method of accounting, having made a valid election to do so under the provisions of Section 736 (a) of the Internal Revenue Code. An applicable Treasury Regulation, (Regulations 112, Section 35.736 (a)-3, as amended by T. D. 5388), provides that, when such an election under 736 (a) has been exercised, the accrual method of accounting shall be used in computing the taxpayer's "surtax net income" under Section 710 (a) (1) (B) of the Internal Revenue Code, which provides that normal taxes and excess profits taxes shall not exceed 80% of the taxpayer's "surtax net income, computed under section 15, * * * but without regard to the credit provided in section 26 (e) * * *."

The question is whether the court below erred in holding that the petitioner was required to construct a fictitious "surtax net income" (computed without the benefit of Section 26 (e)) on the accrual basis of accounting, and take 80% of the resulting imaginary figure as the over-all limitation of normal taxes and excess profits taxes under Section 710 (a) (1) (B) of the Internal Revenue Code, instead of being allowed to use its actual surtax net income, computed on the installment basis of accounting, as the

statute requires, and in upholding the validity of the applicable Treasury Regulation.

Statutes and Regulations Involved

The applicable provisions of the statutes and regulations involved are set forth in the Appendix, infra, pp. 14-19.

Statement

The facts in the case are not in dispute. The case was submitted to the Tax Court on an agreed stipulation of facts which facts were adopted by the Tax Court in its opinion (R. 88).

The Petitioner was a corporation organized and existing under the laws of Alabama with its principal office at 1818 First Avenue North, Birmingham, Alabama. It was dissolved on September 29, 1947, but under Title 10, Sec. 110 of the Code of Alabama of 1940 it remains in existence for five (5) years for the purpose of winding up its affairs (R. 88).

The Petitioner, during the taxable periods involved in the case, was engaged in the business of selling clothing and furniture at retail, largely on the installment plan. Its net income for income tax purposes and surtax purposes was computed on the installment basis of accounting under the provisions of Section 44 (a) of the Internal Revenue Code. For both of the taxable years involved in this proceeding, for excess profits tax purposes, the Petitioner elected to compute its income on the accrual basis of accounting instead of the installment basis, such procedure being authorized by Section 736 (a) of the Internal Revenue Code. The Petitioner fulfilled the requirements of the statute and established its eligibility to compute its income for excess profits tax purposes on the accrual basis (R. 88, 89).

Section 710 (a) (1) (B) of the Internal Revenue Code

provides for an over-all limitation on combined income and excess profits taxes of eighty per cent (80%) of the taxpayer's surtax net income (computed without benefit of Section 26 (e)). The Petitioner was required under the circumstances set forth in the preceding paragraph, to compute its surtax net income (computed without benefit of Section 26 (e)) under Section 15 of the Internal Revenue Code, on the installment basis of accounting. It then used eighty per cent (80%) of the amount of its surtax net income as the over-all limitation of taxes under the provisions of Section 710 (a) (1) (B) of the Internal Revenue Code. The Commissioner contends, and is upheld by the Tax Court and the Court of Appeals, that Petitioner is required to use a fictitious "surtax net income" (computed without benefit of Section 26 (e)) calculated on the accrual basis of accounting as the over-all limitation under the said Section 710 (a) (1) (B). This controversy brings into question the validity of the applicable portion of Section 35.736 (a)-3 of Regulation 112, (as amended by T. D. 5388) (R. 92).

Reasons for Granting the Writ

1. The Court below has rendered a decision in this case which is admittedly in conflict with the decision of the United States Court of Appeals for the Ninth Circuit on the same matter in the case of *Basalt Rock Co., Inc.* v. *Commissioner*, (C. A. 9, 1950) 180 F. (2d) 281, cert. den. 339 U. S. 966 (R. 112).

2. The Court below has decided an important question of federal law which has not been, but should be, settled by this Court.

3. The Court below erred in holding that the Petitioner, for the taxable years 1944 and 1945 was required to construct a fictitious "surtax net income" (computed without the benefit of Section 26 (e)) on the accrual basis of

accounting, and take eighty per cent (80%) of the resulting figure as the over-all limitation of income taxes and excess profits taxes under Section 710 (a) (1) (B) of the Internal Revenue Code, instead of being allowed to use its actual surtax net income (computed on the installment basis of accounting) as the statute requires (R. 108-114).

For the foregoing reasons the Petitioner submits that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CRAMPTON HARRIS,
Attorney for Petitioner.